

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEAN EDWARD MANES,

Defendant and Appellant.

B277262

(Los Angeles County
Super. Ct. No. MA064345)

APPEAL from an order of the Superior Court of Los Angeles County. Frank M. Tavelman, Judge. Affirmed.

Richard L. Fitzner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dean Edward Manes (defendant) appeals from the denial of his motion to reduce his convictions of forgery and identity theft to misdemeanors under Proposition 47. As defendant relies on unsettled authority published after he filed the notice of appeal, and the record on appeal is inadequate to consider defendant's contention, we affirm the court's order without prejudice to the filing of a new motion.

BACKGROUND

In 2014, defendant was charged by information with six felony counts. On January 20, 2016, the day the matter was called for trial, defendant was convicted following a plea agreement under which he pled no contest to two of the charged counts: forgery, in violation of Penal Code section 476¹; and possession of personal identifying information of 10 or more people with the intent to defraud, in violation of section 530.5, subdivision (c)(3) (identity theft). Defendant also admitted the allegation that he had suffered a prior conviction that qualified as a "strike" under the "Three Strikes" law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)), and that he committed the current offense while released on bail, within the meaning of section 12022.1. The trial court sentenced defendant to a total term of seven years four months in prison, comprised of the middle term of two years for the identity theft (count 3), doubled as a second strike, plus a consecutive two-year enhancement pursuant to section 12022.1, subdivision (b), and a consecutive 16-month term (one-third the middle term, doubled) for the forgery (count 4).

Thereafter, defendant filed a motion to reduce his forgery conviction from a felony to a misdemeanor pursuant to section 1170.18, subdivision (a) (Proposition 47). On July 1, 2016, the

¹ All further statutory references are to the Penal Code unless indicated otherwise.

trial court found that defendant's felony conviction was not eligible for reduction, and denied the motion. Defendant filed a timely notice of appeal from the order denying the motion.

DISCUSSION

Defendant contends that the trial court erred in finding that his forgery conviction did not qualify for reduction under Proposition 47, which reclassified forgery as a misdemeanor where the value of the forged instrument did not exceed \$950. (§ 473, subd. (b); 1170.18, subd. (a).) Defendant contends that the court erred in summarily denying the motion, as the motion alleged a value of no more than \$950.

Respondent agrees that section 473, subdivision (b) is applicable to a violation of section 476, as are other forgery statutes. (See, e.g., *People v. Maynarich* (2016) 248 Cal.App.4th 77, 80 (*Maynarich*) [forgery under section 475]; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 743 [forgery under section 470]; *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1308-1309, [same].) Respondent points out, however, that defendant was convicted of both forgery and identity theft, as defined in section 530.5. By its express terms, section 473, subdivision (b) Proposition 47 relief is not available “to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.” (§ 473, subd. (b).)

In reply, defendant cites *People v. Gonzales* (2016) 6 Cal.App.5th 1067, review granted Feb. 15, 2017, S240044 (*Gonzales*). In *Gonzales*, the appellate court found the use of “both” in section 437, subdivision (b), to be ambiguous as to whether the exception applied only to forgery and identity theft which arose from the same transaction, or whether it also applied to independent transactions. To construe the language, the court looked to Proposition 47 election materials, and quoted the Legislative Analyst as follows: “Under this measure, forging a

check worth \$950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft *in connection with* forging a check.’ [Citation.]” (*Gonzales, supra*, at p. 1073, quoting Voter Information Guide, Gen Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35.) The court concluded that to preclude reduction to a misdemeanor, the forgery and identity theft must be found to have been committed in a transactionally related manner. (*Gonzales*, at p. 1073.)

Respondent argues that here, the record shows that the two crimes were transactionally related, because they were committed on the same date. Defendant points out, however, that the information alleges that the crimes were committed on *or about* September 18, 2014, and no other facts in the record shows they were in fact committed on the same day. Even if they were, defendant argues, quoting from *Ondarza v. Superior Court* (1980) 106 Cal.App.3d 195, 203, the “commission of two separate crimes on the same day does not justify an inference that they were necessarily connected.”

We agree that other than the alleged date range, nothing in this record indicates that the two crimes may have been transactionally related. However, we also note that nothing in this record indicates that the two crimes were *not* transactionally related. The appellate record consists of a clerk’s transcript containing the information, four minute orders (the arraignment, defendant’s no contest plea, sentencing, and denial of Proposition 47 motion), the abstract of judgment, defendant’s motion, the order of denial, and the notice of appeal. As defendant was charged by information in mid-December 2014, we assume there was a transcript of the preliminary hearing before the court at that time. (See Cal. Const., art. I, § 14; § 682.) We further observe that the same judge presided over the arraignment

through sentencing, and that the court considered and denied defendant's Proposition 47 motion. Thus, we presume that the trial court had information about the circumstances of the two crimes. As none of this information appears in the appellate record, we have no occasion to agree or disagree with the statutory interpretation made in *Gonzales*.

It is defendant's burden to allege facts in his petition to show his eligibility for resentencing. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 963, 965.) It is also defendant's burden to present a record adequate for review. In that defendant has failed to do so, we presume that the trial court's order is correct. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565.)

We note, however, that *Gonzales* was the first published opinion which questioned whether the exception to the applicability of section 473, subdivision (b), requires a transactional relationship between the two crimes, and *Gonzales* was published after the denial of defendant's motion and the filing of the notice of appeal. Further, defendant's motion was prepared on a Los Angeles Superior Court form which did not elicit a statement of the factual basis of the forgery and identity theft. Under such circumstances, we find it appropriate to affirm the judgment without prejudice to the filing of a new motion with the necessary factual showing. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 140-141.)

DISPOSITION

The order denying defendant's motion to reduce his forgery and identity theft convictions to misdemeanors is affirmed without prejudice to consideration of a subsequent motion properly alleging defendant's eligibility for such relief.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT